IN THE

Supreme Court of the United States

October Term, 1977.

No. 77-678.

ATLANTIC SHIPPING, INC.
CIE CHAMBON MACLOVIA S.A.,

Petitioner,

v.

STEPHEN EDYNAK,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

AVRAM G. ADLER,
STANLEY PAUL KOPS,
ADLER, BARISH, DANIELS,
LEVIN AND CRESKOFF,
Second Floor,
Rohm & Haas Building,
Independence Mall West,
6th and Market Streets,
Philadelphia, Penna. 19106

Attorneys for Respondent.

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

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ARGUMENT.

I. None of the Considerations That Ordinarily Warrant This Court to Grant Certiorari Are Present in This Case.

Petitioner seeks to invoke the jurisdiction of this Court on writ of certiorari pursuant to Rule 19(1)(b) of the Rules of the Supreme Court of the United States which, in pertinent part, states:

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

Petitioner would invoke the jurisdiction of this Honorable Court under its supervisory powers. Yet it concedes that this case is without value as a precedent inasmuch as the injuries in the instant case occurred prior to the 1972 amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq. (LHWCA). The opinion of the Court of Appeals for the Third Circuit appropriately and adequately deals with the legal issues raised in *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U. S. 249, 93 S. Ct. 493 (1972), *Usner v. Luckenback Overseas Corp.*, 400 U. S. 494, 91 S. Ct. 514 (1971) and *Victory Carriers, Inc. v. Law*, 404 U. S. 202, 92 S. Ct. 418 (1971).

The jury found in the context of the charge of the Court that the cause of the accident was an improper method of operation which had been going on not only all day but for two days previous.

While the crane was land-based, it was an integral part of the discharging operation. Attached to the crane was the bucket. The bucket physically went in the hold of the vessel, seized the cargo and took it ashore. The so-called "magic line" between the pier and the ship's side was crossed repeatedly. The jury by its verdict found that in fact there was a duty upon the vessel owner acting through its master and officers to monitor and correct a method of operation that is not reasonably safe and to stop it if it should continue.

Abstract phrases about ownership and control are totally foreign to this case. This is a garden variety circumstance where the stevedore, who is the longshoreman's employer, is hired to unload a ship.

Seas Shipping Co. v. Sieracki, 328 U. S. 85 (1946) lends no exception to the thrust of its doctrine that a ship owner's obligation of seaworthiness extends to longshoremen injured while doing the ship's work.

Pope & Talbot, Inc. v. Hawn, et al., 346 U. S. 406, 1953 extended the doctrine of *Sieracki* to apply to any shoreside worker who comes aboard a vessel to accomplish work traditionally done by seamen. In the *Hawn* case, it was the shoreside carpenter. Neither *Hawn* nor *Sieracki* care one whit as to who is the payroll employer of the person doing the work of a seaman. This was demonstrated in *Reed v. Steamship Yaka*, 373 U. S. 410 (1963). Reed was a longshoreman and his employer was the bareboat charterer of the vessel. The bareboat charterer had full possession and control of the vessel and its cargo. It was claimed by the employer that the plaintiff was barred

by the Longshoremen's and Harbor Workers' Compensation Act inasmuch as it was the statutory employer. The Supreme Court would have none of it when it said:

> ". . . that a shipowner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts and that the shipowner's obligation is rooted, not in the contracts but in the hazards of the work". 373 U. S. 414-415.
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> . . .
>
> "Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company. As we said in a slightly different factual context, 'All were entitled to like treatment under the law.'" 373 U. S. 415.

The ship itself was being banged by the improper method of operation. The procedure by which this crane was used in a free fall with a heavy bucket endangered not only the plaintiff but the vessel and the people working aboard the vessel.

Nothing in *Victory Carriers* or *Executive Jet Aviation, Inc.* in any way does violence to the established concept that an improper method of operation renders a vessel unseaworthy. This was so defined in *Morales v. City of Galveston,* 370 U. S. 165, 170 (1962) and reiterated in great detail in *Thompson v. Calmar Steamship Corp.,* 331 F. 2d 657 (C. A. 3, 1964). See also *Ferrante v. Swedish American Lines,* 331 F. 2d 571, cert. den. 379 U. S. 801 (1964); *Scott v. Isbrandtsen Co.,* 327 F. 2d 113 (C. A. 4, 1964).

This was pointed out by the Trial Court:

> "I find no case that denies the applicability of maritime law or the doctrine of 'seaworthiness' to a shipboard accident, solely because the equipment causing the accident is land-based and not owned by the shipowner. Where, as here, the contention is an improper method of operation, as opposed to defective equipment, the location and ownership of the crane would not provide a basis for lowering the shipowner's duty to protect those aboard ship by stopping the improper operation." (A24) [1]

Apart from the swinging of the bucket out of control when the free-fall method is used, there was the added serious fault with that method, inasmuch as the operator must suspend the bucket by a constant foot pressure subject to the vicissitudes of temporary fatigue or relaxation whereas when the bucket is powered down it is controlled by a lever and these factors are absent. There was no single, isolated personal act of negligence. This was a method used that day and prior days and in the past because it was faster, but, unfortunately, also reckless (309a-311a).

The petitioner has exorcised the Court of Appeals for honoring the trial judge's appraisal of the evidence and the exercise of his discretion in permitting the verdict to stand when challenged for excessiveness. This has long been a tradition in Pennsylvania for an appellate court to so do. *Murphy v. Taylor,* 440 Pa. 186, 194 (1966), 216 A. 2d 64; *Hall v. George,* 403 Pa. 563, 170 A. 2d 367 (1961); *Kane v. Scranton Transit Co.,* 372 Pa. 496, 94 A. 2d 560; *Skoda v. W. Penn Power Co.,* 411 Pa. 323, 191 A. 2d 822 (1963).

In fact, the Court of Appeals for the Third Circuit in *Thompson v. Trent Maritime Co.,* 353 F. 2d 632, 636 (1965) reversed the trial judge when he granted a remit-

1. The use of the letter "A" indicates a reference to the petition for writ of certiorari; the use of the letter "a" indicates a reference to the original appendix.

titur absent the showing of undesirable or pernicious influence on the jury.

The Trial Court in its opinion explained why it was not shocked by the verdict. In the most summary form, plaintiff had a severe crush injury to his left hand. The treating surgeon, who was a diplomate of the American Board of Plastic Surgery and was a specialist in hand surgery, found that in addition he was severely traumatized from a psychological standpoint because of the severity of the injury (408a). The skin of the back of his hand was completely torn away. The metacarpal bones which connect the wrist to the fingers were fractured. There were seven hospital stays and nine operations. In order to forestall amputation, it was necessary to resurface the back of his left hand. After the dead tissue had been removed, his hand was sewn to his abdomen where it remained in that position for approximately three weeks so that the raw exposed flesh could receive its nourishment thereby and secure a skin flap from the abodmen (409a).

Despite silicone blocks being inserted between the fingers to attempt to maintain a useful broad palm, the surgeon found that it was not possible to restore Mr. Edynak to a normal hand because of the severity of the injury. It is of no moment that he is presently employed by the former third-party defendant to this action. The future holds no guarantees. The only thing that is permanent in this case is that for the rest of his life, he will have a claw where once he had a complete, effective and prehensile instrument. The verdict was not excessive.

CONCLUSION.

None of the criteria under Rule 19(b) of the Supreme Court rules warrant the granting of a petition for writ of certiorari in this case. The case was fairly tried under the maritime laws which existed prior to the recent amendments to the Longshoremen's and Harbor Workers' Compensation Act. The jury found that the vessel was unseaworthy and the defendant negligent. The defendant's testimony lacked credibility. The verdict was warranted by the nature of the injury, the many hospitalizations, the multiple operations and the residual result.

The Court of Appeals, in a well-reasoned opinion, in full recognition that it is for almost all purposes the court of last resort, dealt fairly with the arguments of the petitioner.

Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

AVRAM G. ADLER,
STANLEY PAUL KOPS,
ADLER, BARISH, DANIELS,
LEVIN AND CRESKOFF,
Attorneys for Respondent.